

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JACOB FREDERICK JOCHUM and
JACOB F. JOCHUM, JR., d/b/a
JACK JOCHUM TRUCK SERVICE,

Appellants,

v.

Appeal No. 08-0362

WASTE MANAGEMENT OF WEST VIRGINIA,
INC., a corporation,

AMERICAN DISPOSAL SERVICES OF
WEST VIRGINIA, INC., a corporation,
d/b/a ROHRIG SANITATION, SHORT
CREEK LANDFILL, and ALLIED WASTE
SERVICES OF WHEELING,

BFI WASTE SYSTEMS OF NORTH
AMERICA, INC., a corporation,

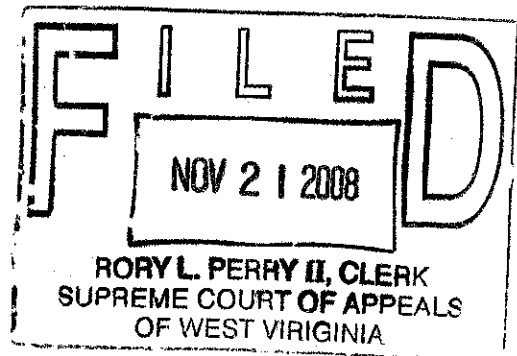
ALLIED WASTE SERVICES OF NORTH
AMERICA, LLC, a corporation, and

JEFF BROWN,

Appellees.

REPLY BRIEF ON BEHALF OF AMERICAN DISPOSAL
SERVICES OF WEST VIRGINIA, INC., d/b/a ROHRIG SANITATION,
SHORT CREEK LANDFILL, ALLIED WASTE SERVICES
OF WHEELING, BFI WASTE SYSTEMS OF NORTH AMERICA, INC.,
ALLIED WASTE SERVICES OF NORTH AMERICA, LLC AND JEFF
BROWN TO APPELLATE BRIEF OF JACOB FREDERICK JOCHUM and
JACOB F. JOCHUM, JR., d/b/a JACK JOCHUM TRUCK SERVICE,

Comes now, American Disposal Services of West Virginia, Inc., d/b/a Rohrig
Sanitation, Short Creek Landfill, Allied Waste Services of Wheeling, BFI Waste Systems of



North America, Inc., Allied Waste Services of North America, LLC and Jeff Brown (ADS or Appellee) by counsel , Samuel F. Hanna, and hereby responds to the Appellate Brief of Jacob Frederick Jochum and Jacob F. Jochum, Jr., d/b/a Jack Jochum Truck Service (Appellants) as follows:

Although the vast majority of the Appellant's Brief of Jacob Frederick Jochum and Jacob F. Jochum, Jr., d/b/a Jack Jochum Truck Service pertains to Waste Management of West Virginia, Inc. (Waste Management), counsel for Appellants state that "Due to delays caused by American Disposal Services, a competitor which opposed the agreement, the PSC didn't approve the transfer until December, 2005." (p. 7). In response, ADS was exercising its statutory and constitutional right to protest the transfer application of the certificates which are the subject of this lawsuit pursuant to W. Va. Code §24A-2-5 and related statutes. Any "delays" in the appeal process at the Public Service Commission were not caused by ADS. For example, on March 30, 2005, the Staff of the West Virginia Public Service Commission objected and filed written exceptions to the Recommended Decision of the Administrative Law Judge arguing that the Administrative Law Judge should have revoked the roll-off authority because the Jochums had not registered equipment to transport roll-off containers. While the Administrative Law Judge concluded that roll-off containers can be moved without using a roll-off power unit, the West Virginia Public Service Commission Staff argued that a company that transports a roll-off container without a certificate "is engaged in the unlawful transportation of solid waste in violation of W. Va. Code §24A-2-

5(a) and Motor Carrier Rule 3.17a.” Using unregistered vehicles to transport solid waste also violates the PSC’s annual vehicle registration insurance premium, Staff wrote. (Exhibit A, p.6).

In addition, in the Appellate Brief of Jacob Frederick Jochum and Jacob F. Jochum, Jr., d/b/a Jack Jochum Truck Service counsel stated that this Court should reverse the trial court summary judgment ruling regarding provision section 9(d) of the agreement between Appellants and Waste Management because a genuine issue of material fact exists whether or not it was satisfied or violated. As set forth in the agreement between the Appellants and Waste Management, Section 9(d) states, “Seller and Buyer shall have received all necessary governmental consents, including the approval of the West Virginia Public Service Commission and the consents to the assignment of Seller’s customers including any municipal contract that may exist.” Counsel for the Appellants argue that Provision 9(d) was satisfied in December 2005, when the Public Service Commission entered a Commission Order granting the transfer of the certificates. (Appellate brief p. 18). Although ADS did, on February 27, 2006, file a petition to this Honorable Court regarding the Public Service Commission’s Order of December 25, 2005, it did not ask for a stay of that Final Order pursuant to W. Va. Code §24A-8-1. Therefore, the parties could have transferred the certificates anytime after that date as Public Service Commission approval had been obtained. Moreover, the decision of *Harper v. Public Service Commission of West Virginia*, 427 F.Supp 2d 707 (S.D. W. Va. April 11, 2006), was not issued until April 11, 2006, over three months after the Public Service Commission approved the transfer.

Finally, as set forth in the Commission Order of December 11, 2006, under Finding Of Fact Number 20, "On June 28, 2006, Waste Management petitioned to reopen the Jochum transfer cases, advising that it has not commenced operations under the Jochum authority because it had been awaiting the Commissions approval for a rate increase." (Exhibit B) (emphasis added). Likewise, the Appellants were also awaiting the PSC's decision on the previously requested rate increase. (Exhibit B, p.4). Therefore, the proposed voluntary transfer of the certificates had not been completed at the time a decision was issued in the *Harper* case because Waste Management and the Appellants were waiting for the Commission's approval for a rate increase and not because of any actions of ADS.

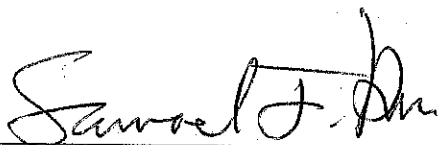
PRAYER

WHEREFORE, ADS prays that this Court take no action to prejudice its rights and for such further relief as this Court deems fit and proper.

Respectfully submitted;

AMERICAN DISPOSAL SERVICES OF WEST VIRGINIA, INC., d/b/a ROHRIG SANITATION, SHORT CREEK LANDFILL, and ALLIED WASTE SERVICES OF WHEELING, BFI WASTE SYSTEMS OF NORTH AMERICA, INC., ALLIED WASTE SERVICES OF NORTH AMERICA, LLC AND JEFF BROWN

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CERTIFICATE OF SERVICE

I, SAMUEL F. HANNA, counsel for the Defendants, do hereby certify that service of the foregoing **REPLY BRIEF ON BEHALF OF AMERICAN DISPOSAL SERVICES OF WEST VIRGINIA, INC., d/b/a ROHRIG SANITATION, SHORT CREEK LANDFILL, ALLIED WASTE SERVICES OF WHEELING, BFI WASTE SYSTEMS OF NORTH AMERICA, INC., ALLIED WASTE SERVICES OF NORTH AMERICA, LLC AND JEFF BROWN TO APPELLATE BRIEF OF JACOB FREDERICK JOCHUM and JACOB F. JOCHUM, JR., d/b/a JACK JOCHUM**

EXHIBITS
ON
FILE IN THE
CLERK'S OFFICE